Trujillo v. Apple Computer, Inc. et al Doc. 141

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOSE TRUJILLO, individually and on behalf of all others similarly situated,

Plaintiff,

v.

APPLE COMPUTER, INC., a California Corporation, and AT&T MOBILITY LLC, a Georgia Corporation,

Defendants.

No. 07 CV 04946

Judge Kennelly
Mag. Judge Ashman

DEFENDANT AT&T MOBILITY LLC'S ANSWER AND AFFIRMATIVE AND OTHER DEFENSES TO FIRST AMENDED CLASS ACTION COMPLAINT

Defendant AT&T Mobility LLC ("ATTM"), by and through its attorneys, answers Plaintiff Jose Trujillo's ("Plaintiff") Complaint as follows:

INTRODUCTION

This case arises out of Defendants' purposeful and fraudulent concealment to purchasers of its iPhone cellular telephone that they will be required to incur an annual fee of $85.95 as part of Defendants' battery replacement program.

ANSWER: ATTM admits that Plaintiff purports to allege a claim for concealment. ATTM denies that it manufactures iPhone cellular telephones, denies that it sold an iPhone to Plaintiff and denies that it has an iPhone battery replacement program. ATTM denies Plaintiff's claims and the remaining allegations of this Introduction.

PARTIES

1. Plaintiff, Trujillo, at all times relevant hereto resided in village of Melrose Park, County of Cook, Illinois.

ANSWER: ATTM is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of Paragraph 1 and, therefore, denies the same.

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2. At all times relevant hereto, Defendant, Apple, was a California corporation with facilities located throughout Illinois and the United States, whose headquarters are located in Cupertino, California and who is doing business in Cook County, Illinois.

ANSWER: On information and belief, ATTM admits that Apple is a California corporation and that its corporate headquarters are located in Cupertino, California. On information and belief, ATTM further admits that Apple has retail stores in Cook County, Illinois and other locations in the United States. ATTM is without knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations of Paragraph 2 and, therefore, denies the same.

3. At all times relevant hereto, Defendant, AT&T Mobility, LLC, was a Georgia corporation with facilities located throughout Illinois and the United States, whose headquarters are located in Atlanta, Georgia and who is doing business in Cook County, Illinois.

ANSWER: ATTM denies that it is a Georgia limited liability company. ATTM admits that its headquarters are located in Atlanta, Georgia. ATTM admits that it has stores located in Cook County and throughout Illinois and the United States and admits that it is doing business in Cook County. ATTM denies the remaining allegations of Paragraph 3.

4. This Court has jurisdiction over this action pursuant to 28 U.S.C. §1331 and /or §1332, as amended by the Class Action Fairness Act of 2005, because the matter in controversy exceeds $5,000,000.00, exclusive of interest and costs, and is a class action in which some members of the class are citizens of states different than Defendants. *See* 28 U.S.C. §1332(d)(2)(A). in [sic] that the Defendant has transacted business and committed acts relating to the matters complained of herein in this state, and the Plaintiff and Defendants are citizens of separate states.

ANSWER: ATTM denies that this court has jurisdiction over this action pursuant to 28 U.S.C. § 1331. ATTM admits that this Court has subject matter jurisdiction over this action under 28 U.S.C. § 1332 because the purported amount in controversy exceeds $5 million and because it is a class action in which some members of the class are citizens of states different than Defendants. ATTM admits that Plaintiff and Defendants are citizens of separate states. The remainder of the second sentence in Paragraph 4 is vague and ambiguous and ATTM lacks information sufficient to form a belief as to the truth or falsity of these allegations and, therefore, denies the same. ATTM denies any remaining allegations of Paragraph 4.

5. Venue is proper in this District pursuant to 28 U.S.C. §1391(a)(2) because a substantial part of the acts giving rise to Plaintiff's claims occurred in this District.

ANSWER: ATTM admits that venue is proper in this District pursuant to 28 U.S.C. §1391 because the acts purportedly giving rise to Plaintiff's claim occurred in this District.

6. This Court has supplemental jurisdiction over the state law claims herein under 28 U.S.C. § 1367.

ANSWER: ATTM responds that this Paragraph contains a conclusion of law to which no response is required. To the extent that any response is required, ATTM denies the allegations of Paragraph 6.

SUBSTANTIVE ALLEGATIONS

7. On or about June 29, 2007 Apple launched, to much fanfare, its iPhone, a hybrid cell phone, iPod media player, and wireless web-browsing device.

ANSWER: ATTM admits that on June 29, 2007 Apple began selling the iPhone which combines three products, a mobile phone, an iPod and an internet communications device with email, web browsing, searching and maps. ATTM denies the remaining allegations of Paragraph 7.

8. Plaintiff purchased his iPhone from an Apple retail store located in Oakbrook, Illinois, for $533.93.

ANSWER: ATTM admits that Plaintiff purchased his iPhone from an Apple retail store in Oakbrook, Illinois for $533.93.

9. It is estimated that Apple sold over 500,000 iPhones within the first week following its launch. These devices were sold in Apple and AT&T retail stores and online through Apple's website.

ANSWER: ATTM admits that the iPhones were sold in Apple retail stores and ATTM retail stores and online through Apple's website. ATTM is without information sufficient to form a belief as the truth or falsity of the remaining allegations of Paragraph 9 and, therefore, denies the same.

10. AT&T is the iPhone's exclusive carrier, and along with Apple retails the iPhone in their retail stores.

ANSWER: ATTM admits that it is the exclusive authorized carrier in the United States for the iPhone. ATTM further admits that it sells iPhones in its ATTM retail stores.

11. Apple marketed its iPhone as a "revolutionary new mobile phone" that incorporates "high technology".

ANSWER: Upon information and belief, ATTM admits that Apple used the terms "revolutionary new mobile phone" and "high technology" in certain marketing materials.

12. Unknown to the Plaintiff, and undisclosed to the public, prior to purchase, the iPhone is a sealed unit with its battery soldered on the inside of the device so that it cannot be changed by the owner.

ANSWER: ATTM denies the allegations of Paragraph 12.

13. The battery enclosed in the iPhone can only be charged approximately 300 times before it will be in need of replacement, necessitating a new battery annually for owners of the iPhone.

ANSWER: ATTM denies the allegations of Paragraph 13.

14. Apple maintains a "battery replacement program" for the iPhone which requires users to submit their phone to Apple for service. For the battery replacement and/or service, Apple charges $79.00 plus $6.95 for shipping and handling, totaling $85.95 per service.

ANSWER: ATTM admits that Apple offers a battery replacement for out-of-warranty iPhones for $79.00 plus $6.95 for shipping, for a total of $85.95. ATTM denies the remaining allegations of Paragraph 14.

15. The battery replacement takes three days, and while the iPhone is under repair, Apple provides a 'loaner iPhone' for $29.00.

ANSWER: Upon information and belief, ATTM admits that the Apple out-of-warranty battery repair process for the iPhone normally take three business days. ATTM further admits, upon information and belief, that Apple can provide a service phone to a consumer while the iPhone is being repaired by Apple for $29.00. ATTM denies the remaining allegations of Paragraph 15.

16. During the repair and/or service to the iPhone under the battery replacement program, all data is erased from the iPhone, including contact phone numbers, etc.

ANSWER: Upon information and belief, ATTM admits that the Apple out-of-warranty battery repair process will clear all data from the iPhone. ATTM denies the remaining allegations of Paragraph 16.

17. Although Apple and AT&T outlined its cellular service rates and many other features of the iPhone in advance of its launch, Apple and AT&T waited to disclose the durability of its battery, the terms and conditions of its battery replacement program and 'loaner' program, and the cost of same, until after the iPhone went on sale.

ANSWER: ATTM admits that Apple and ATTM outlined cellular service rates and other features of the iPhone in advance of the launch. Upon information and belief, ATTM denies that the durability of the iPhone battery, the terms and conditions of the Apple out-of-warranty battery replacement program, loaner program and costs were not disclosed until after the iPhone went on sale.

18. The iPhone packaging and its enclosed manuals and/or papers failed to inform the Plaintiff and the class of the durability of the iPhone battery, the terms and condition of its battery replacement program and 'loaner' program, and the cost of same.

ANSWER: ATTM denies the allegations of Paragraph 18.

19. The Defendants' marketing and promotion of the iPhone failed to inform the Plaintiff and the class of the durability of its battery, the terms and conditions of its battery replacement program and 'loaner' program, and the cost of same.

ANSWER: ATTM denies the allegations of Paragraph 19.

20. On or about Thursday, July 5, 2007 Apple spokesperson, Jennifer Hakes, said Apple posted the battery replacement program details on its website after the iPhone went on sale.

ANSWER: ATTM is without information sufficient to form a belief as to the truth or falsity of the allegations of Paragraph 20 and, therefore, denies the same.

21. The battery replacement program information on Apple's website was located under several layers of links on the support page of Apple's website.

ANSWER: ATTM lacks information sufficient to form a belief as to the truth or falsity of the allegations of Paragraph 21 and, therefore, denies the same.

22. The battery replacement program will cost iPhone consumers nearly 20% of the purchase price of their phone annually, amounting to a de facto annual maintenance and/or service charge.

ANSWER: ATTM denies the allegations of Paragraph 22.

23. The terms and costs of the battery replacement program, and the durability and life of the battery, were not disclosed to Plaintiff and the class prior to their purchase, and could not have been discovered by Plaintiff and the class where Apple and AT&T failed to disclose same in advance of the iPhone launch date.

ANSWER: ATTM denies the allegations of Paragraph 23. Further answering, upon information and belief, ATTM states that the terms and costs of the Apple out-of-warranty replacement program, the durability and life of the iPhone battery were available on the Apple website on the iPhone launch date.

24. The Plaintiff and the class were required to sign a minimum two-year service plan with AT&T at the time of purchase of the iPhone.

ANSWER: ATTM denies the allegations of Paragraph 24. Further answering, ATTM denies that Plaintiff entered into a two-year service plan with ATTM for the iPhone he purchased at the Apple retail store in Oakbrook, Illinois, at the time of purchase or any time thereafter. Further answering, ATTM denies that all members of the purported class were required to sign a service plan with ATTM at the time of purchase of the iPhone.

CLASS ALLEGATIONS

25. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, Plaintiff brings this action on behalf of himself and a class of similarly situated individuals. The class consists of all consumers, from 2007 to the date of judgment, throughout the United States, who purchased Defendants' iPhone.

ANSWER: ATTM admits that Plaintiff purports to bring this action on behalf of the purported class described in Paragraph 25. ATTM denies that this action may be properly maintained as a class action, and specifically denies Plaintiff's claims and the claims of the putative class. ATTM denies the remaining allegations of Paragraph 25.

26. Upon information and belief, the Plaintiff class numbers in at least the hundreds of thousands, if not millions, such that joinder of all members is impracticable.

ANSWER: ATTM denies the allegations of Paragraph 26 and denies that this case is appropriate for class treatment.

27. Common questions predominate over questions affecting individual members of the class. Common questions include:

i. Whether Defendants committed a breach of the Illinois Consumer Fraud and Deceptive Business Practices Act, and all like and similar statutes throughout the United States;

ii. Whether Defendants purposefully omitted, misrepresented, and/or fraudulently concealed the durability of the iPhone battery, the terms and conditions of its battery replacement program and "loaner" program, and the cost of same, prior to purchase by Plaintiff and the class.

iii. Whether Defendants committed a breach of contract and/or breach of warranty to Plaintiff and the class.

iv. Whether Defendants were unjustly enriched to the detriment of Plaintiff and the Class.

ANSWER: ATTM denies the allegations of Paragraph 27 and each subparagraph thereof and further denies that this case is appropriate for class treatment.

28. Plaintiff will fairly and adequately protect the interest of the class; Plaintiff has retained counsel competent and experienced in class action litigation; and Plaintiff has no interests antagonistic to those of the Plaintiff class members.

ANSWER: ATTM denies the allegations of Paragraph 28 and denies that this case is appropriate for class treatment.

29. A class action is an appropriate method for fairly and efficiently adjudicating this controversy because, among other things, joinder of all members of the class is impracticable, and employing the class action device here, in lieu of entertaining individual suits on the same issue, would greatly serve judicial economy.

ANSWER: ATTM denies the allegations of Paragraph 29 and denies that this case is appropriate for class treatment.

COUNT I: FRAUDULENT CONCEALMENT

1-29 Plaintiff incorporates the allegations of ¶1-¶29 above of this Complaint as if fully stated herein in this Count I.

ANSWER: ATTM incorporates by reference its answers to Paragraphs 1-29 as its answer to this Paragraph.

30. Defendants concealed the following material facts from Plaintiff and the class prior to their purchase of the iPhone:

a. That the iPhone battery is enclosed and soldered inside the iPhone, and cannot be changed by the owner but instead must be returned to Apple for service and/or repair;

b. That the iPhone battery has a durability and/or lifetime of approximately 300 charges, necessitating frequent and more than annual maintenance, repair, and/or replacement if charged regularly on a daily basis;

c. That replacement, repair, and/or maintenance of the iPhone battery will cost Plaintiff and the class approximately $85.95 under the Defendants' battery replacement program;

d. That the battery replacement program requires Plaintiff and the class to be without their iPhone for approximately three days, and results in complete loss of all stored data;

e. That Defendants will charge Plaintiff and the class $29.00 for use of an iPhone while their phone is being serviced under the battery replacement program.

f. That annually, Plaintiff and the class will incur costs of approximately 20% of the purchase price of the iPhone simply for maintenance, repair, and/or replacement of the iPhone battery.

ANSWER: ATTM denies the allegations of Paragraph 30 and each subparagraph thereof.

31. The facts as alleged in ¶30(a)-(f) above, and the ninth-inning disclosure by Defendants of same, were material in that had Plaintiff and the class known the true nature of the iPhone and its actual expense they would not have purchased the iPhone from Defendants or conducted business with Defendants.

ANSWER: ATTM denies the allegations of Paragraph 31.

32. Defendants require that Plaintiff and the class sign a two-year service contract, all but ensuring that Plaintiff and the class will be forced to pay for the iPhone battery replacement program at least once during the initial two year contract.

ANSWER: ATTM denies that Plaintiff was required to sign a two-year service contract and denies that Plaintiff entered into a two-year service plan with ATTM for the iPhone he purchased at the Apple retail store in Oakbrook, Illinois, at the time of purchase or any time thereafter. Further answering, ATTM denies that all members of the purported class were required to sign a service plan with ATTM at the time of purchase of the iPhone. ATTM denies the remaining allegations of Paragraph 32.

33. Defendant had a duty to disclose the material facts, as alleged in ¶30(a)-(f) above, to Plaintiff and the Class because Defendant was in a position of superior knowledge to Plaintiff, in that Defendants knew of, and Plaintiff could never have known of, the fraudulent nature of Defendants' misrepresentations, omissions, and statements.

ANSWER: ATTM denies the allegations of Paragraph 33.

34. As a result of Defendants' fraudulent concealment of material facts, such as those alleged in ¶30(a)-(f) above, Plaintiff and the class have and will suffer damages.

ANSWER: ATTM denies the allegations of Paragraph 34.

COUNT II: ILLINOIS CONSUMER FRAUD AND DECEPTIVE BUSINESS PRACTICES ACT

1-29 Plaintiff incorporates the allegations of ¶1-¶29 above of this Complaint as if fully stated herein in this Count II.

ANSWER: ATTM incorporates by reference its answers to Paragraphs 1-29 as its answer to this Paragraph. ATTM notes that the remaining paragraphs of the Complaint are not numbered consecutively. ATTM will refer to the remaining numbered paragraphs by count and paragraph number.

30. By and through its advertisements, marketing, promotions, packaging, and manual, Defendants fraudulently misrepresented, concealed, and or omitted material facts to and from Plaintiff and the class, such as:

a. That the iPhone battery is enclosed and soldered inside the iPhone, and cannot be changed by the owner but instead must be returned to Apple for service and/or repair;

b. That the iPhone battery has a durability and/or lifetime of approximately 300 charges, necessitating frequent and more than annual maintenance, repair, and/or replacement if charged regularly on a daily basis;

c. That replacement, repair, and/or maintenance of the iPhone battery will cost Plaintiff and the class approximately $85.95 under the Defendants' battery replacement program;

d. That the battery replacement program requires Plaintiff and the class to be without their iPhone for approximately three days, and results in complete loss of all stored data;

e. That Defendants will charge Plaintiff and the class $29.00 for use of an iPhone while their phone is being serviced under the battery replacement program.

f. That annually, Plaintiff and the class will incur costs of approximately 20% of the purchase price of the iPhone simply for maintenance, repair, and/or replacement of the iPhone battery.

ANSWER: ATTM denies the allegations of Paragraph 30 of Count II and each subparagraph thereof.

31. Such fraud was committed by Defendants in the course of trade and commerce, as Plaintiff and the class were consumers of Defendants' product.

ANSWER: ATTM denies the allegations of Paragraph 31 of Count II.

32. Defendants had knowledge of the following:

a. That the iPhone battery is enclosed and soldered inside the iPhone, and cannot be changed by the owner but instead must be returned to Apple for service and/or repair;

b. That the iPhone battery has a durability and/or lifetime of approximately 300 charges, necessitating frequent and more than annual maintenance, repair, and/or replacement if charged regularly on a daily basis;

c. That replacement, repair, and/or maintenance of the iPhone battery will cost Plaintiff and the class approximately $85.95 under the Defendants' battery replacement program;

d. That the battery replacement program requires Plaintiff and the class to be without their iPhone for approximately three days, and results in complete loss of all stored data;

e. That Defendants will charge Plaintiff and the class $29.00 for use of an iPhone while their phone is being serviced under the battery replacement program;

f. That annually, Plaintiff and the class will incur costs of approximately 20% of the purchase price of the iPhone simply for maintenance, repair, and/or replacement of the iPhone battery.

ANSWER: Upon information and belief, ATTM admits that the iPhone contains a rechargeable lithium-ion battery and admits that Apple offers a battery replacement for out-of-warranty iPhones for $79.00 plus $6.95 for shipping. Upon information and belief, ATTM further admits that the Apple out-of-warranty battery repair process for the iPhone normally takes three days and that Apple offers a service phone for a customer to use during the Apple repair for $29.00. Upon information and belief, ATTM also admits that the Apple out-of-warranty battery repair process will clear all data from the iPhone. ATTM denies the remaining allegations of Paragraph 32 of Count II and each subparagraph thereof.

33. Defendants intended that its fraudulent statements, omissions, and/or concealments induce Plaintiff and the class to act so that Plaintiff and the class would purchase Defendants' iPhone.

ANSWER: ATTM denies the allegations of Paragraph 33 of Count II.

34. Defendants intended that their fraudulent statements, omissions, and/or concealments induce Plaintiff and the class to act so that Plaintiff and the class would then be forced to pay to Defendants approximately $85.95 for the battery replacement program, and $29.00 for use of a loaner iPhone, annually.

ANSWER: ATTM denies the allegations of Paragraph 34 of Count II.

35. Defendants require Plaintiff and the class to sign a two-year service contract, all but ensuring that Plaintiff and the class will be forced to pay for the iPhone battery replacement program at least once during the initial two year contract.

ANSWER: ATTM admits that its iPhone service plans are based on a two-year service agreement with ATTM. ATTM denies that Plaintiff entered into a two-year service plan with ATTM for the iPhone he purchased at the Apple retail store in Oakbrook, Illinois, at the time of purchase or any time thereafter. Further answering, ATTM denies that all members of the purported class were required to sign a service plan with ATTM at the time of purchase of the iPhone. ATTM denies the remaining allegations of Paragraph 35 of Count II.

36. Plaintiff and the class relied upon the truth of Defendants' statements, believing all costs associated with the iPhone to have been fully disclosed prior to purchase of same.

ANSWER: ATTM is without information sufficient to form a belief as to the truth or falsity of the allegations of Paragraph 36 of Count II and, therefore, denies the same.

37. Defendants' aforementioned conduct is unfair, immoral, unethical, oppressive, and unscrupulous, in that Defendants concealed from Plaintiff and the class members those allegations in ¶¶30(a-f) and 32(a-f) above, as alleged herein.

ANSWER: ATTM denies the allegations of Paragraph 37 of Count II.

38. As a proximate result of Defendants' fraudulent statements, concealments, misrepresentations and/or omissions Plaintiff and the class have and will suffer damages, because absent Defendants' fraud, the Plaintiff and the class would have never purchased the iPhone from Defendants or transacted business with Defendants.

ANSWER: ATTM denies the allegations of Paragraph 38 of Count II.

COUNT III: BREACH OF CONTRACT

1-29 Plaintiff incorporated the allegations of ¶1-¶29 above of this Complaint as if fully stated herein in this Count III.

ANSWER: ATTM incorporates by reference its answers to Paragraphs 1-29 as its answer to this Paragraph.

30. Defendants made an offer to sell to Plaintiff and the class a functional and complete iPhone with a battery in exchange for its relative purchase price, which varies by model, store, etc.

ANSWER: ATTM admits that it offered iPhone at its ATTM retail stores and that the purchase price of the iPhone varied by model. ATTM denies the remaining allegations of Paragraph 30 of Count III.

31. Plaintiff and the class accepted Defendants' offer by going to Defendants' stores and purchasing the iPhone.

ANSWER: ATTM denies the allegations of Paragraph 31 of Count III. Answering further, ATTM states that Plaintiff purchased an iPhone at the Apple retail store in Oakbrook, Illinois, and not at an ATTM retail store.

32. Defendants breached their offer to sell to Plaintiff and the class a functional and complete iPhone with a battery when Defendants failed to disclose to Plaintiff and the class prior to their purchase that:

a. That the iPhone battery is enclosed and soldered inside the iPhone, and cannot be changed by the owner but instead must be returned to Apple for service and/or repair;

b. That the iPhone battery has a durability and/or lifetime of approximately 300 charges, necessitating frequent and more than annual maintenance, repair, and/or replacement if charged regularly on a daily basis;

c. That replacement, repair, and/or maintenance of the iPhone battery will cost Plaintiff and the class approximately $85.95 under the Defendants' battery replacement program;

d. That the battery replacement program requires Plaintiff and the class to be without their iPhone for approximately three days, and results in complete loss of all stored data;

e. That Defendants will charge Plaintiff and the class $29.00 for use of an iPhone while their phone is being serviced under the battery replacement program.

f. That annually, Plaintiff and the class will incur costs of approximately 20% of the purchase price of the iPhone simply for maintenance, repair, and/or replacement of the iPhone battery.

g. Defendants require that Plaintiff and the class sign a two-year service contract, all but ensuring that Plaintiff and the class will be forced to pay for the iPhone battery replacement program at least once during the initial two year contract.

ANSWER: ATTM denies the allegations of Paragraph 32 of Count III and each subparagraph thereof.

33. Plaintiff and the class have and will suffer damages as a proximate result of Defendants' breach of contract.

ANSWER: ATTM denies the allegations of Paragraph 33 of Count III.

COUNT IV: BREACH OF IMPLIED WARRANTIES

1-29 Plaintiff incorporates the allegations of ¶1-¶29 above of this Complaint as if fully stated herein in this Count IV.

ANSWER: ATTM incorporates by reference its answers to Paragraphs 1-29 as its answer to this Paragraph.

30. Defendants have committed a breach of implied warranty of merchantability pursuant to 810 ILCS 5/2-314 and/or implied warranty of fitness for a particular purpose pursuant to 810 ILCS 5/2-315.

ANSWER: ATTM denies the allegations of Paragraph 30 of Count IV.

31. Defendants' iPhone is a consumer good and Defendants are merchants within the meaning of 810 ILCS 5/2-314.

ANSWER: This paragraph contains legal conclusions to which no response is required. To the extent any response is required, ATTM denies that it is the "merchant" or the "seller" of the iPhone that plaintiff purchased at the Apple retail store in Oakbrook, Illinois, within the meaning of the 810 ILCS 5/2-314. ATTM admits that an iPhone is a "good" as defined in 810 ILCS 5/2-103. ATTM denies the remaining allegations of Paragraph 31 of Count IV.

32. Defendants' iPhone has been sold with the implied warranty that they are fit for ordinary use and/or particular purposes for which cellular phones are used, and that all costs associated with the use of same are disclosed in advance of the purchase.

ANSWER: This paragraph contains legal conclusions to which no response is required. To the extent any response is required, ATTM denies that it sold plaintiff an iPhone with any implied warranty and denies the remaining allegations of Paragraph 32 of Count IV.

33. Defendants' affirmations of fact as alleged herein formed the basis of the bargain between the parties.

ANSWER: This paragraph contains legal conclusions to which no response is required. To the extent any response is required, ATTM denies that there was any contract or other "basis of the bargain" between ATTM and plaintiff. ATTM denies the remaining allegations of Paragraph 33 of Count IV.

34. Defendants' iPhone is not reasonably fit for its ordinary use and/or particular purpose in that when Plaintiff and the class purchased their iPhones they never contemplated the following:

a. That the iPhone battery is enclosed and soldered inside the iPhone, and cannot be changed by the owner but instead must be returned to Apple for service and/or repair;

b. That the iPhone battery has a durability and/or lifetime of approximately 300 charges, necessitating frequent and more than annual maintenance, repair, and/or replacement if charged regularly on a daily basis;

c. That replacement, repair, and/or maintenance of the iPhone battery will cost Plaintiff and the class approximately $85.95 under the Defendants' battery replacement program;

d. That the battery replacement program requires Plaintiff and the class to be without their iPhone for approximately three days, and results in complete loss of all stored data;

e. That Defendants will charge Plaintiff and the class $29.00 for use of an iPhone while their phone is being serviced under the battery replacement program.

f. That annually, Plaintiff and the class will incur costs of approximately 20% of the purchase price of the iPhone simply for maintenance, repair, and/or replacement of the iPhone battery.

ANSWER: ATTM denies the allegations of Paragraph 34 of Count IV and each subparagraph thereof.

35. A consumer advocacy group, the Foundation for Consumer and Taxpayer Rights, said of consumers who purchased the iPhone from Defendants that "[s]ome of them might be waking up now wondering who they got in bed with", calling the "hidden disclosure that's going to cost the user as much as 20 percent of the purchase price [annually]…a colossal mistake."

ANSWER: ATTM is without information sufficient to form a belief as to the truth or falsity of the allegations of Paragraph 35 of Count IV and, therefore, denies the same.

36. Defendants require that Plaintiff and the class sign a two-year service contract, all but ensuring that Plaintiff and the class will be forced to pay for the iPhone battery replacement program at least once during the initial two year contract.

ANSWER: ATTM admits that its iPhone service plans are based on a two-year service agreement with ATTM. Further answering, ATTM denies that Plaintiff entered into a two-year service contract for the iPhone that he purchased at the Apple store in Oakbrook, Illinois, at the time of purchase or any time thereafter. Further answering, ATTM denies that all members of the purported class were required to sign a service plan with ATTM at the time of purchase of the iPhone. ATTM denies the remaining allegations of Paragraph 36 of Count IV.

37. As a proximate result of Defendants' breach of implied warranty, Plaintiff and the class have and will suffer damages.

ANSWER: ATTM denies the allegations of Paragraph 37 of Count IV.

COUNT V: UNJUST ENRICHMENT

1-29 Plaintiff incorporates the allegations of ¶1-¶29 above of this Complaint as if fully stated herein in this Count V.

ANSWER: ATTM incorporates by reference its answers to Paragraphs 1-29 as its answer to this Paragraph.

30. This Count V for unjust enrichment is plead in the alternative to Plaintiff's and the class' claim for breach of contract.

ANSWER: Paragraph 30 of Count V states a conclusion of law to which no response is required. To the extent any response is required, ATTM denies the allegations of Paragraph 30 of Count V.

31. Defendants, to the detriment of the Plaintiff and the Class, have benefited and been unjustly enriched by their conduct where they have sold and continue to sell their iPhone while misrepresenting, omitting, and/or concealing from Plaintiff and the class prior to purchase:

a. That the iPhone battery is enclosed and soldered inside the iPhone, and cannot be changed by the owner but instead must be returned to Apple for service and/or repair;

b. That the iPhone battery has a durability and/or lifetime of approximately 300 charges, necessitating frequent and more than annual maintenance, repair, and/or replacement if charged regularly on a daily basis;

c. That replacement, repair, and/or maintenance of the iPhone battery will cost Plaintiff and the class approximately $85.95 under the Defendants' battery replacement program;

d. That the battery replacement program requires Plaintiff and the class to be without their iPhone for approximately three days, and results in complete loss of all stored data;

e. That Defendants will charge Plaintiff and the class $29.00 for use of an iPhone while their phone is being serviced under the battery replacement program.

f. That annually, Plaintiff and the class will incur costs of approximately 20% of the purchase price of the iPhone simply for maintenance, repair, and/or replacement of the iPhone battery.

g. That it is all but guaranteed that Plaintiff and the class will be forced to pay for the iPhone battery replacement program at least once during the initial two year contract where Defendants require that Plaintiff and the class sign a two-year service contract, and the battery is not manufactured to last that long with regular and reasonable use.

ANSWER: ATTM denies the allegations in Paragraph 31 of Count V and each subparagraph thereof.

32. Defendants had and have knowledge of these benefits, and have voluntarily accepted and retained these benefits by intentionally and fraudulently concealing, omitting, and/or misrepresenting the true capabilities and service fees associated with the iPhone battery prior to purchase by Plaintiff and the class.

ANSWER: ATTM denies the allegations of Paragraph 32 of Count V.

33. The circumstances described herein are such that it would be inequitable, unconscionable, unfair, unlawful, and unjust for Defendants to retain these ill-gotten benefits without paying the value thereof to the Plaintiff and the class.

ANSWER: ATTM denies the allegations of Paragraph 33 of Count V.

34. As a result of Defendants' unjust enrichment, Plaintiff and the class have and will suffer damages.

ANSWER: ATTM denies the allegations of Paragraph 34 of Count V.

COUNT VI: ACCOUNTING

1-29. Plaintiff incorporates the allegations of ¶1-¶29 above of this Complaint as if fully stated herein in this Count V.

ANSWER: ATTM incorporates a reference its answers to Paragraphs 1-29 as its answer to this Paragraph.

30. Pursuant to the above-described conduct and causes of action, the circumstances or relationship between the parties gives rise to a duty on the part of Defendants to account to Plaintiffs.

ANSWER: ATTM denies the allegations of Paragraph 30 of Count VI.

31. No other adequate remedy at law exists.

ANSWER: Paragraph 31 of Count VI contains a conclusion of law to which no response is required. To the extent any response is required, ATTM denies the allegations of Paragraph 31 of Count VI.

32. The exact amount of income, revenue, and interest generated and retained by Defendants from Plaintiff's and the class' purchase of the iPhone, and the income, revenue, and interest that has and will be generated by Defendants from Plaintiff's and the class' payment of fees under the Defendants' iPhone battery replacement program cannot be presently known because all books of account and records pertaining to same are in the possession of Defendants.

ANSWER: ATTM admits that to the extent that information relating to income, revenue and interest relating to the purported class member purchases of iPhones exists, it is in the possession of Defendants. ATTM denies that it has a battery replacement program and denies that ATTM will generate any income, revenue or interest from any payment of fees for Apple's out-of-warranty battery replacement program. ATTM admits that any records pertaining to income, revenue or interest from the Apple's out-of-warranty battery replacement program is in the possession of Apple. Further answering, ATTM denies that plaintiff is entitled to any accounting and denies the remaining allegations of Paragraph 32 of Count VI.

33. Accordingly, an accounting would permit Plaintiffs, the class, and the Court to ascertain the amounts due to Plaintiffs and the class.

ANSWER: ATTM denies the allegations of Paragraph 33 of Count VI.

34. An accounting should be conducted in equity under the supervision of this Court because it would involve intricate itemizations of income, prospective income, revenue and interest, prospective revenue and interest, and there is a need for discovery.

ANSWER: ATTM denies the allegations of Paragraph 34 of Count VI.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that this Honorable Court:

A. Certify the class and appoint Plaintiff and Plaintiff's counsel to represent the Class;

B. Find that Defendants committed a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act, fraudulent concealment, breach of contract, breach of implied warranty, and were unjustly enriched;

C. Find that Defendants should account for all revenues improperly earned, as alleged herein;

D. Find that Defendants pay actual, compensatory, and punitive damages for their conduct as alleged herein;

E. Award reasonable attorneys' fees and costs; and

F. Grant such other relief as this Court deems appropriate.

ANSWER: WHEREFORE, ATTM denies that Plaintiff is entitled to any relief and denies that this action is appropriate for class treatment.

AFFIRMATIVE OR OTHER DEFENSES

FIRST DEFENSE

The Complaint fails to state facts sufficient to state a cause of action against ATTM.

SECOND DEFENSE
(no transaction with ATTM)

Plaintiff brought his iPhone from an Apple store in Oakbrook, Illinois; not from an ATTM retail store. Plaintiff did not enter into a service contract with ATTM for the iPhone that he purchased from Apple. Plaintiff has no claim against ATTM for fraud, consumer fraud, breach of contract, breach of warranty, or unjust enrichment with respect to his purchase of an iPhone from an Apple retail store.

THIRD DEFENSE
(no standing)

Plaintiff lacks standing to pursue any claims against ATTM.

FOURTH DEFENSE
(no deception)

Plaintiff's complaint does not identify any misleading or deceptive statements by ATTM.

FIFTH DEFENSE
(no deception)

Plaintiff's claim that Defendants failed to disclose the durability of the iPhone battery or that the iPhone may have to be returned to Apple for battery repair or replacement is untenable because the feature label affixed to the exterior of the Apple iPhone box disclosed this information. Specifically, the iPhone box provides: "Battery has limited recharge cycles and may eventually need to be replaced by Apple service provider. Battery life and charge cycles vary by use and settings. See www.apple.com/batteries." See Jensen Decl. in Support of Apple Motion for Summary Judgment, Ex. A; Pl. Resp. to Apple Summary Judgment Motion, Ex. C. *Trujillo v. Apple*, September 23, 2008 Memorandum Opinion and Order, pp. 3-4;

SIXTH DEFENSE
(no deception)

In light of the disclosures made on the outside of the Apple iPhone box, there was no deception or suggestion that the out-of-warranty battery replacement would be free of charge. Thus, the remaining details of Apple's out-of-warranty battery repair program were immaterial to a reasonable consumer's decision to purchase an iPhone. *Trujillo v. Apple*, September 23, 2008 Memorandum Opinion and Order, pp. 5-7.

SEVENTH DEFENSE
(no deception)

Any claim by Plaintiff that Defendants failed to disclose the requirement of a two-year minimum service contract to activate the iPhone fails because the feature label affixed to the exterior of the Apple iPhone box clearly discloses: "Requirements: Minimum new two-year wireless service plan with AT&T required to activate all iPhone features, including iPod features." See Jensen Decl. in Support of Apple Motion for Summary Judgment, Ex. A.

EIGHTH DEFENSE
(no inducement/causation)

Plaintiff cannot establish that any conduct of ATTM caused him to purchase the iPhone from the Apple retail store in Oakbrook, Illinois.

NINTH DEFENSE
(no causation/damages)

Plaintiff cannot recover from ATTM for any purported claims because ATTM's conduct did not cause plaintiff any damages. Plaintiff did not pay any amounts to ATTM for the iPhone he purchased at the Apple retail store in Oakbrook, Illinois. Further, Plaintiff has not paid and would not pay ATTM for any battery replacement costs if the iPhone battery were to fail outside of the warranty period. Nor did Plaintiff enter into a service contract with ATTM for the iPhone that he purchased from Apple. ATTM did not cause and would not cause Plaintiff any damages relating to his iPhone purchase or his iPhone battery.

TENTH DEFENSE
(no breach of contract/warranty)

Plaintiff cannot maintain a breach of contract claim against ATTM for his iPhone purchase because Plaintiff did not buy the iPhone from ATTM. Thus ATTM is not a "seller" liable to Plaintiff for breach of contract or breach of warranty under the Illinois UCC.

ELEVENTH DEFENSE
(unjust enrichment)

Plaintiff cannot maintain a claim for unjust enrichment because Plaintiff purchased the iPhone at an Apple retail store and never entered into a service contract with ATTM for the phone. Plaintiff has conferred no benefit on ATTM, unjust or otherwise, that has enriched ATTM.

RESERVATIONS OF ADDITIONAL DEFENSES

ATTM reserves the right to raise any additional defenses, affirmative or otherwise, which may become apparent through discovery during the course of this action. ATTM further reserves the right to add additional defenses and/or counterclaims in the event this action is certified for class treatment, including, but not limited to the defenses of res judicata, judgment, statute of limitations, payment, discharge and bankruptcy, and it further reserves the right to assert counterclaims against any such person to the extent required in order to preserve its rights.

PRAYER FOR RELIEF

WHEREFORE, Defendant ATTM prays for the entry of judgment in its favor and against Plaintiff and for costs in this suit.

Respectfully submitted,

Dated: December 12, 2008

/s/ Victoria R. Collado

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CERTIFICATE OF SERVICE

I, Victoria R. Collado, an attorney, hereby certify that a true and correct copy of the foregoing **DEFENDANT AT&T MOBILITY LLC'S ANSWER AND AFFIRMATIVE AND OTHER DEFENSES TO FIRST AMENDED CLASS ACTION COMPLAINT** was served on the following counsel of record via electronic delivery on December 12, 2008:

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Dated: December 12, 2008 *Attorney for Defendant AT&T Mobility LLC*